Supreme Court, U.S.
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No. 061178

IN THE

Supreme Court of the United States

STEPHEN HABAN and ONE PIECE OF REALTY LOCATED AT 5800 S.W. 74TH AVENUE, MIAMI, FLORIDA, More Particularly Described as Lot 3, Block 3,of Camner Estates According To the Plat Book 58 at Page 21 of the Public Records of Dade County, Florida Together with All Appurtences Thereto and All Improvements Thereon,

Petitioners,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the ostensibly-consensual, unexpected warrantless search of a criminal suspect's home—while the suspect stands naked on his front porch in broad daylight, dripping wet from having been summoned from the shower, wrapped only in a towel, surrounded by police—violates the suspect's Fourth Amendment rights.

II. Whether the Eleventh Circuit violated Haban's due process rights by applying the law of the case doctrine in a clearly erroneous fashion, denying full faith and credit to the state suppression ruling.

III. Whether this Court should limit its holding in *United States v. Raddatz* and require district judges to conduct an evidentiary hearing de novo where the magistrate judge recommends denial of a motion to suppress physical evidence based on contested credibility determinations.

PARTIES TO THE PROCEEDING BELOW

Haban, Stephen, Petitioner

One Piece of Real Property Located at
5800 S.W. 74th Avenue, Miami, Florida, Petitioner

United States of America, Respondent

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REPORTS OF OPINIONS BELOW

The opinion of the Eleventh Circuit giving rise to this petition is *United States v. One Piece of Real Property Located at 5800 S.W. 74th Avenue, Miami, Florida*, No. 05-12550; 182 Fed. Appx. 921; 2006 U.S. App. LEXIS 12993 (11th Circuit May 25, 2006)(unpublished opinion). *See* A-1

An earlier reported opinion in this case is *United States v. One Piece of Real Property Located at 5800 S.W. 74th Avenue, Miami, Florida*, 363 F.3d 1099 (11th Cir. 2004). *See* A-7.

STATEMENT OF BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered by the Eleventh Circuit on May 25, 2006. There was a timely petition for rehearing that was denied by order entered on November 16, 2006. The mandate has been stayed until disposition of this petition. This Court has jurisdiction to review by certiorari the judgment in question pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 1738:

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions

1. Introduction:

This is a petition for certiorari taken from the Eleventh Circuit's judgment affirming the district court's final summary judgment in a civil forfeiture action. A-1 The Government seized the Defendant home owned by the Petitioner, Stephen J. Haban, following a warrantless search made on June 15, 2001 by a team of both state and federal law enforcement agencies.The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Haban filed motions to suppress physical evidence, admissions and statements, asserting that such evidence was obtained by unlawful search and seizure, in that the agents had no warrant and his purported consent was involuntarily

obtained. R.34; R.35.

In the related criminal case in the Florida state court arising out of the same search and seizure which led to this forfeiture action, by order rendered on January 14, 2003, the court granted Haban's motion to suppress physical evidence and motion to suppress Defendant's statements, expressly finding that the warrantless search and seizure of the subject property was performed without consent in violation of Haban's constitutional rights. A-18.

2. The Erroneous Summary Judgment By Default:

The Government filed its Motion for Summary Judgment with supporting memorandum of law on November 27, 2002. In his Report and Recommendations entered on January 24, 2003, following the federal suppression hearing, the magistrate judge recommended that Haban's motions to suppress (which were virtually identical to the state motions to suppress) be denied. R.54.

Before the time expired for Mr. Haban to object to the magistrate's report and recommendations, the district judge entered an order granting the Government's motion for summary judgment "by default" due to prior counsel's failure to file a written response. R.58. The Eleventh Circuit reversed that summary judgment. *United States v. One Piece of Real Property Located at 5800 SW 74th Avenue*, 363 F.3d 1099 (11th Cir. 2004)(*Haban I*), holding that a final summary judgment could not properly be entered by default when the record contained evidence which would create a genuine issue of material fact. A-7.

The Eleventh Circuit in *Haban I* held that evidence in the record, including the deposition of Beth Yannuci Fahmie,

"suggests that the circumstances under which Haban consented to the search may have been coercive." R.81-7. That testimony included Ms. Fahmie's testimony, quoted by the Eleventh Circuit that:

> when Haban "went to sign the [form]", the police said "no, no, no, not there," and had him re-sign it. Apparently Haban began to sign the blank that indicated a refusal to waive his rights and consent to the search. The police, however, allegedly stopped him, and only then did he sign the blank indicating that he was aware of, and waived, his rights. These facts, if true, indicate that the search was not consensual and that its eventual occurrence was, therefore, illegal.

R.81-8.

3. Proceedings After Remand:

After reversal of the summary judgment entered by default and remand for further proceedings, the Government responded to Haban's objections to the magistrate's report and recommendations that the motions to suppress be denied. R.82. In that response the Government conceded that "[a] district judge must review a magistrate judge's factual finding *de novo* when an objection is made." R.82-3. However, the Government argued that a new evidentiary hearing was not warranted by the law or the factual circumstances of this case. *Id.* The Government argued that the magistrate judge had appropriately determined the credibility of the conflicting witnesses, and that the district court had no obligation to re-hear the testimony from those witnesses. R.82-5.

The district court entered an order adopting the

Magistrate's Report and Recommendation that the motions to suppress be denied. R.82. That order makes no factual findings concerning the issue of whether Mr. Haban voluntarily consented to the search. *Id.*

The Government then renewed its motion for summary judgment. R.85. The district court again prematurely granted the Government's motion for summary judgment before the original time period for filing a response to that motion had expired. R.88. The Government filed its motion for entry of final judgment of forfeiture. Mr. Haban timely filed his motion for reconsideration of the order granting summary judgment. R.95. No final judgment having been entered, Mr. Haban also filed a motion to reconsider ruling on motions to suppress and for a *de novo* evidentiary hearing. R.94. Mr. Haban also filed his motion for leave to file supplemental pleading attempting to raise the defense of collateral estoppel. R.92. A proposed supplemental answer accompanied that motion. R.93.

The district court by its order entered on April 1, 2005 denied Haban's motion to reconsider and granted the Government's motion for final judgment of forfeiture. R.97. The district court rejected the argument "that the federal government was collaterally estopped from re-litigating the state court rulings on the motion to suppress," citing the Eleventh Circuit's statement in *Haban I* that "federal courts . . . are not bound by the state court's decision." R.97 (quoting *Haban I,* 363 F.3d at 1101.

Haban timely appealed the district court's judgment of forfeiture. R.99. The district court granted his motion for stay of execution pending appeal. R.106.

The Eleventh Circuit affirmed the summary final judgment of forfeiture. A-1. That court rejected Haban's

argument that the search was involuntary, holding: "Because the police officer's testimony was not exceedingly improbable, the district court did not err in finding her credible, and, thus, did not err by finding that Haban voluntarily consented to the search of his home." *Haban II* at A-3.

The Eleventh Circuit rejected Haban's argument that the district judge should have conducted a new evidentiary hearing, holding: "Because the Supreme Court has held that a district court is not required to conduct a de novo evidentiary hearing when a party objects to a magistrate's recommendations, the district court did not abuse its discretion by denying Haban a de novo evidentiary hearing." *Haban II* at A-4.

Finally, rejecting Mr. Haban's position that he should have been allowed to defend the forfeiture on the ground that the state court ruling suppressing the evidence collaterally estopped the re-litigation of the consent to search issue, the court below stated: "Because this Court held, in an earlier appeal in this case, that a state court's ruling on a motion to suppress was not binding on the federal court, the law-of-the-case doctrine barred the district court from reconsidering the issue." *Haban II* at A-6.

B. Statement of the Facts:

1. Introduction:

The parties stipulated that the claimant, Haban was the owner of the subject property with standing to contest the lawfulness of the search and seizure. R.77-14. The parties also stipulated that the search and seizure was performed without a warrant. *Id.*

On June 15, 2001 at about 11:00 a.m. detectives from the Miami-Dade County, Florida Police Department Narcotics

Unit and federal agents arrived unannounced at the subject property, Haban's longtime home located in a quiet residential neighborhood in suburban Miami at 5800 SW 74th Avenue. R.77-16. The detectives' purpose in going to that residence was to investigate pursuant to an "initial tip from a confidential informant advising [Detective Fernandez] that the residence was being utilized to grow marijuana." R.77-16. Haban had never been arrested before this incident. R. 77-141. He had never had any contact with the police other than routine traffic stops. *Id.*

Squad members went onto the front porch of the dwelling and knocked on the door. R.77-19. "[A] female voice answered and asked who it was." R.77-19. Detective Donnelly "advised the female voice that it was the police" and informed her that they "needed to speak to whoever was inside. R.77-19. The female voice was that of Haban's girlfriend, Beth Fahmie, who obeyed the police request and fetched Haban from the bathroom, where he was taking a shower. R.77-20.

2. Mr. Haban's Version of the Facts:

Beth Fahmie responded to the knock on the door from the police that morning. R.77-115. Ms. Fahmie went to summon Haban, who was in the shower at the time. R.77-118. "He got out of the shower, put a towel around his waist and went to the door" while still wet from the shower. R.77-118. Haban "cracked the door open slightly but it was pushed a little farther open" and he was "kind of swooped out the door" by one of the police officers. R.77-119.

Ms. Fahmie witnessed Detective Donnelly requesting that Haban sign the consent to search form. "She was explaining that he needed to sign the papers so that they could enter the house." R.77-123. Haban "asked if he could have an

attorney at this time, if he could have a telephone," to which Detective Donnelly "didn't have a response" but to which "[t]he sergeant in the doorway [Halburian] said no." R.77-123. When asked how many times Haban requested an attorney, Ms. Fahmie responded: "Several." R.77-124. The police refused those requests; when Haban asked for an attorney, Detective "Donnelly would turn and look at the sergeant in the doorway," but the sergeant told him "no." R.77-125.

Ms. Fahmie testified that Detective Donnelly prevented Haban from signing the *Miranda* form (Exhibit 2) in the "no" box where he attempted to sign it. R.77-126-27. Detective Donnelly checked the "yes" box on the form and told Haban to sign that box instead of the "no" box. Ms. Fahmie testified "I saw her check the boxes and tell him that this was where he needed to sign." R.77-127.

Ms. Fahmie described the demeanor of the police at the time of the search and seizure as follows: "I would say that they were using their authority to mentally intimidate him, yes." R.77-136. The police told Haban "that he had to stay there, right there on the porch. That he couldn't move until these papers were signed, and if he didn't want to sign them, within four hours they would have a warrant, but he wasn't moving from the table, were their words." R.77-136.

Haban described the events of being summoned by Ms. Fahmie while he was in the shower, and wrapping himself in a towel to go to the door where the police were waiting. R.77-144. Haban asked Detective Donnelly if she had a search warrant and, before she could respond, Sergeant Halburian said that if Haban "didn't open the door, he would break it in with the team." R.77-149.

Haban testified that he started to write his initials "S.H."

in the blank on the Waiver of Rights form which said "no," meaning that he did not understand those rights, when Detective Donnelly stopped him and said, "no, no, I can't sign there." R.77-166. She then "checked off simultaneously all . . . [the yes boxes] and she told [Haban] to sign there." *Id.* Haban testified that he told her that he did not understand his rights and did not understand why he could not have an attorney present. *Id.*

When asked whether he eventually affixed his initials to all of the "yes" lines on the form, Haban answered as follows:

> At that point I—yes, because of the fact that there was no other alternative to my situation. They weren't going to give me an attorney. They weren't going to honor my rights. At that point it may have been a situation where I could be in danger of—they weren't physically hitting me or anything to that effect physically, but they were both verbally and visually intimidating and their positioning around me restricted my ability to get up and go back in my house. And I felt also if I were to try to go back in my house on my own that they would—they would block it. And it was obvious; he [Sergeant Halburian] was at my front door.

R.77-166-167.

Haban testified that Sergeant Halburian ignored Haban's instructions to "[g]et your foot out of my house. You are trespassing." R.77-167. Sergeant Halburian responded in the following manner:

> Sergeant Halburian is very—he is very dry, generic, like it's just direct. No. No, you won't have an attorney. You will sit here until you get a warrant. You cannot have a phone. You cannot have clothes. No. We will tear your house apart with the team and arrest your girlfriend. It's very direct, very generic, and very intimidating because it's a straight mon—it's not a shout, it's just a monotone, just straight to the point, this is the way its happening. And that's why I said it was their way or their way. So if I didn't want to sign that consent to search, I would sit in that space with a towel for four hours. And he told me this, while they would get a warrant and come back and tear my house apart.

R.77-168.

Haban explained the context in which he ultimately signed the consent form as follows:

> You do realize at this point they're asking me for money. I had already asked for an attorney. I started to realize—I lived in Miami—I was born here, lived here my whole life. I've seen the Miami River cops.[1] I've seen the Metro Dade Task Force that would take informants' tips and rip drug dealers off. I have

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[1] "Beginning in 1985 and subsequent years, a group of City of Miami police officers known as the 'river cops' engaged in a pattern of activities which involved 'ripping off' drug dealers and ultimately resulted in the drowning deaths of three drug dealers." *United States v. Diaz*, 916 F.2d 655, 657 (11th Cir. 1990).

> also heard of home invaders with badges.
>
> And these guys were asking me for money, denying me counsel, denying me telephone, denying me clothes, and I started to realize that I may have a serious problem on my hands, that I may be facing another situation, that I could have a physical problem also for me and my girlfriend. It could turn now, if I didn't cooperate, it could turn ugly.

R.78-19.

3. Government's Version of the Facts:

A couple of minutes after the police spoke with Ms. Fahmie, Haban came to the door. Haban was clad only in "a large bath towel" and "appeared that he had just gotten out of the shower." R.77-21. As she had testified in the state court suppression hearing, Detective Donnelly testified before the magistrate judge that once Haban came to the door "and opened the door a little bit . . . [she] could smell the odor of marijuana emanating from the residence." R.77-20. Among the detailed findings made by the state court judge in the suppression order entered in the related criminal case was the finding that "[t]he police claim that when the Defendant [Haban] opened the door they could smell the odor of marijuana . . . . is not credible and is rejected . . . [because] Detective Robbins and a drug sniffing dog . . . entered the residence [but the dog] did not 'alert' upon approaching the door and thus the dog could not smell the marijuana all the officers claimed they could smell." *Id.* at ¶¶ 8 & 19.[2]

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[2] As noted by the state judge in that suppression order "the dog had alerted at several locations within the home." *Id.* ¶ 20.

The detective advised Haban why the police were there, "asked him to step out of the residence . . . and he stepped over to the table that was on the porch." R.77-22. Detective Donnelly testified that Haban "had not a problem with" her request and did not ask to consult a lawyer before walking to the table, wet from the shower and wearing only a towel. R.77-22.

Detective Donnelly testified that she presented Haban with a consent to search form, read it to him, advised him "that he had every right to refuse to sign it if he wished to," made sure that he understood the consent, "and he finally initially signed it." R.77-24.

Before signing that form, Haban "asked what his options were" and Detective Donnelly advised him that he could "either sign this form" or she would "attempt to get a search warrant from a judge." R.77-27. After that explanation, according to Detective Donnelly, Haban signed the consent form. R.77-28.

Detective Donnelly testified inconsistently concerning her recollection whether Haban asked for an attorney prior to consenting to the search. At one point in her testimony she stated: "I'm categorically denying that he asked for an attorney." R.77-73. Later during cross examination, however, Detective Donnelly clearly stated that she could not recall one way or the other whether Haban requested to confer with counsel: "No, I do not remember or recall anything about him asking for an attorney." R.77-74. In a follow-up question, she responded as follows: "I want your answer. Is your honest answer that ***you don't recall one way or the other***? A. ***Yes, sir.***" R.77-75 (emphasis added).

Detective Donnelly was asked whether she had told

Haban that, if he did not consent to the search, the police "would end up getting a search warrant," and she agreed that she "said something probably in those lines, but probably not in that exact verbiage." R.77-76. The Detective agreed that she had testified, at the state court suppression hearing, that she "would have told him the options are ***consent or we get a warrant***." R.77-83-84 (emphasis added).

Once the consent form was signed, Detective Donnelly "started reading to [Haban] *Miranda* rights." R.77-30. When asked to initial the form to indicate whether or not Haban understood his *Miranda* rights, he attempted to place his initials by the word "no." R.77-31. Detective Donnelly testified that she stopped him from initialing no, discussed the matter further with Haban, and then she, the detective, marked the "yes box" herself. R.77-31.

Detective Donnelly said that, at no time during the search and seizure did Haban express that he was uncomfortable or embarrassed by his appearance covered only by a wet towel. R.3 at 34. Detective Donnelly did not recall Ms. Fahmie making any request for clothes for Haban during that period. R.77-35. The officers found marijuana in the residence and some photographs of prior harvests. R.77-38. The police found cash totaling $45,000 in the house. R.77-40. R.77-68.

4. State Court Finds Illegal Search and Seizure:

By order dated January 7, 2003, the state court judge in the criminal case which arose out of this same set of circumstances, suppressed the tangible evidence and statements made by Haban on the ground that the search was nonconsensual and Haban's Fourth Amendment and *Miranda* rights had been violated. After hearing the same witnesses who

testified in the federal suppression hearing, the state judge held that he "specifically finds all testimony which is inconsistent with these findings to not be credible or worthy of belief." R.59-12, Ex. at n.3; A-6.

The state court judge found that Haban's efforts to initial the "no" spaces on the forms presented to him by the police "because he did not wish to waive his rights, is credible and is believed." *Id.* ¶ 15.

The state court judge found that Haban's "freedom of action was deprived in a significant way and that he was thus in custody at the time of his interrogation," thereby giving rise to the protections of *Miranda*, and found that "the totality of circumstances that the consent to search was not freely and voluntarily given and that it was given, at best, because the Defendant acquiesced to the show of authority after he was escorted out of his house, in daylight, in view of his neighbors while virtually naked and surrounded and questioned by both male and female officers." *Id.*

The prosecution filed a notice of appeal from that state court suppression order, but thereafter dismissed the appeal and the criminal case against Haban was dismissed on the merits. *State of Florida v. Haban*, 842 So. 2d 123 (Fla. 2003).

5. State and Federal Identity of Interests:

Although the Eleventh Circuit affirmed the district court's denial of leave to plead that the state court's suppression order collaterally estopped the Government from re-litigating the illegal search and seizure issue (and, hence, precluded development of the facts concerning the privity element of the collateral estoppel defense), there was evidence of an identity of interests between the State of Florida and the federal

government in the two cases arising out of the subject incident.

The Government's complaint in this forfeiture action established that the United States and the State of Florida were acting in concert, when it states that this was a ***federal*** investigation in which state narcotics agents participated along with DEA agents, as follows: "[A] Drug Enforcement Administration (hereinafter ***"DEA"*) *investigation was initiated*** .... Pursuant to the investigation, DEA agents and members of the Miami-Dade narcotics unit traveled to 5800 S.W. 74th Avenue, Miami, FL 33143 and knocked on the door of the defendant property." R.1-2 (emphasis added). The Government also signed a Joint Scheduling Report in which it stated that one of the "uncontested facts" in the case was that "the defendant property was searched by state and federal law enforcement." R.11-4. The Eleventh Circuit in *Haban I* noted the collaboration between state and federal law enforcement: "In June 2001, the Drug Enforcement Agency and Miami-Dade police officers initiated an investigation into possible marijuana cultivation and distribution activities at the house of Stephen Haban, the defendant." 363 F.3d at 1100.

Detective Donnelly testified that the Miami-Dade Police Department had a financial interest in the federal forfeiture action if the federal government prevailed in this case. R.77-85. The state and federal agencies had agreed before the raid on Haban's house to share a percentage of the forfeiture proceeds. *Id.*

Haban's affidavit established that he was questioned simultaneously by both federal and state agents during the subject incident. R.65-17, Ex. B.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE OSTENSIBLY, CONSENSUAL, WARRANTLESS SEARCH OF HABAN'S HOME—WHILE HE STOOD NAKED ON HIS FRONT PORCH IN BROAD DAYLIGHT, DRIPPING WET FROM HAVING BEEN SUMMONED FROM THE SHOWER, WRAPPED ONLY IN A TOWEL, SURROUNDED BY POLICE—VIOLATED HIS FOURTH AMENDMENT RIGHTS.

A. Introduction:

The Fourth Amendment exclusionary rule applies in civil forfeiture actions. *E.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). It is the general rule that "warrantless searches are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," including consent[3] to search. *United States v. Gonzalez*, 71 F.3d 819, 825-27 (11th Cir. 1996).

"The Government bears the burden of proving both the existence of consent and that the consent was not a function of acquiesence to a claim of lawful authority but rather was given freely and voluntarily." *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989). Here the district court clearly erred in adopting the magistrate's findings that Haban voluntarily consented to the search of the subject property.

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[3] In this case, the only exception to the warrant requirement offered by the Government below was consent.

B. Standards for Determining Existence of Voluntary Consent:

The question whether consent was voluntary is a factual finding that "depends on the totality of the circumstances." *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001). "In evaluating the totality of the circumstances underlying consent, the court should look at several indicators, including the presence of coercive police procedures, the extent of the defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found." *Id.*

Haban notes that the foregoing list is inclusive, rather than exclusive. He submits that the "totality of the circumstances" involved in this case also should include, among other things, the fact that he was interrupted while taking a shower and still dripping wet and was clothed only with a towel while the police were attempting to obtain his signature on the consent form.

C. Evidence That Consent Was Involuntary:

The evidence in the record, including uncontradicted evidence from the Government's own witnesses, established the absence of Mr. Haban's voluntary consent to the search and seizure. Therefore, the motions to suppress should have been granted.

That evidence included the deposition of Beth Fahmie taken by the Government and filed on November 26, 2002. R.43. Ms. Fahmie testified that the police who searched the subject residence that day did so after denying Haban's request

to consult an attorney[4]; insisting that he sign a consent-to-search form; changing his "no" answer on the *Miranda* warning form to "yes"; and threatening "to make us sit there and get a warrant and tear his house apart and arrest [her]." R.43-39-40.

Ms. Fahmie's testimony that Haban asked to consult counsel was not contradicted by the officer who took the lead in questioning him. Detective Donnelly conceded that she could not recall one way or the other or that Haban asked to consult his attorney. R.3-75.

The Government's own evidence concerning Haban's alleged consent to the search was self-contradictory and insufficient upon which to find voluntary consent in the first place. For example, even the Government's own witnesses agreed that Haban "never gave verbal consent" to the search of his home. R.27-30. Contradictorily, however, the written consent-to-search form which Detective Donnelly directed Haban to sign states that he gave both a verbal and written consent to the search. R.78-51. Detective Donnelly admitted that the form was incorrect wherein it stated: "I hereby acknowledge that I previously gave verbal consent to search without warrant by the officers . . . ." R.78-51.

Because a vitally important part of that form—the

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[4] While the denial of Haban's request to consult an attorney may or may not have been a violation of *Miranda* or the Sixth Amendment under the circumstances, the fact that he asked to consult with an attorney in response to the Government's insistence that he consent to the search is doubtlessly relevant to the Fourth Amendment defense. *See generally, e.g., Romero v. Jordan*, No. 02-6058; 56 Fed. Appx. 886, 888 & n.3; 2003 U.S. App. LEXIS 1076 at **6 (10th Cir. Jan. 23, 2003)(in cases where defendants contend "that they were not read their *Miranda* rights prior to executing a consent to search . . . [court has] treated the *Miranda* issue as one factor in determining whether the consent was voluntary").

statement that verbal consent had been given—was admittedly false, the balance of the form containing the purported written consent carries no weight. Moreover, the admitted falsity of the recitation that verbal consent was given is evidence of the involuntariness of Haban's signature that he consented in writing.

Further examples of uncontested facts which establish the lack of consent, or consent which was involuntarily given, include the following:

1. Haban was being questioned while practically naked and dripping from the shower in a position of great vulnerability;
2. Haban was admittedly "nervous" according to Detective Donnelly's testimony;
3. The position of the officers conducting the questioning on Haban's front porch was psychologically intimidating according to Ms. Fahmie's uncontradicted testimony;
4. Detective Donnelly admitted that she had a poor recollection of the events of that day;
5. Haban had no prior police record and no prior contact with police which would render more likely the notion that he knew of his rights to withhold consent to the search;
6. The drug-sniffing dog did not alert when the door was open to Haban's house, casting grave doubt upon the police testimony that they smelled marijuana and doubt on their testimony that Haban's consent was voluntary.
7. Haban testified without contradiction that he was afraid to withhold consent because of the Miami River Cops episode;
8. Detective Donnelly testified to facts which constituted compulsion to provide consent by admitting that she told Haban that the only alternative to consent would be that

she ***would*** get a search warrant, not that she would ***try*** to get a search warrant. R.77-76, 83-84;

9. Haban tried to initial "no" to the question whether he understood his rights on the *Miranda* form, but Detective Donnelly forced him to change that and initial her check marks in the "yes" blanks on the form;

10. Detective Donnelly's testimony was inherently incredible where she indicated that Haban was not uncomfortable while surrounded by male and female police officers conducting questioning of him while he wore only a wet towel;

11. The police were carrying guns.

12. Haban could not have believed the officers would find no evidence of illegal activities, so his only logical motive in ostensibly granting consent was to prevent harm to himself and his girlfriend.

This Court could well find that, under the totality of the circumstances, the Government failed in its burden of establishing that consent was voluntarily given. Therefore, certiorari should be granted.

II.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE ELEVENTH CIRCUIT VIOLATED HABAN'S DUE PROCESS RIGHTS BY APPLYING THE LAW OF THE CASE DOCTRINE IN A CLEARLY ERRONEOUS FASHION, DENYING FULL FAITH AND CREDIT TO THE STATE SUPPRESSION RULING

This Court should grant review to consider whether Haban was denied due process when the Eleventh Circuit held that "the law-of-the-case doctrine barred the district court from reconsidering the issue [of collateral estoppel]." See *Haban II* at A-6. The Eleventh Circuit's earlier statement in a footnote

in *Haban I* that "[f]ederal courts are not bound by the state court's decision"[5] on a motion to suppress was clearly erroneous, as both the common law and the Full Faith and Credit Statute require federal courts to honor state court suppression rulings where the elements of collateral estoppel are met.

The Eleventh Circuit applied language from this Court's decision in *Elkins v. United States,* 364 U.S. 206 (1960) to support its disregard of the effect of the state court's judgment in Haban's favor based on the Fourth Amendment violation and resulting suppression of evidence. However, *Elkins* did not involve a situation where collateral estoppel was applicable. In actuality, "a federal court must give a state court judgment the same preclusive effect as would be given that judgement under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984). "[U]under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). *See also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982)[6].

Even where the issue decided by the state court is a federal constitutional issue such as a ruling on a motion to suppress evidence based on a Fourth Amendment challenge, the

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[5] *Haban I*, 363 F.3d at 1101 &n.1; A-8.

[6] Several of this Court's cases on the issue addressing the Full Faith and Credit aspects of the collateral estoppel defense are collected by the author David H. Bathe, in Annot., *Supreme Court's Views as to Res Judicata or Collateral Estoppel Effect of State Court Judgments on Federal Courts*, 72 L. Ed. 2d 911 (2005).

Full Faith and Credit Clause requires federal courts to apply collateral estoppel to prevent relitigation of the constitutional issue, where relitigation would be precluded in a subsequent state court action. *E.g., Montana v. United* States, 440 U.S. 147, 155 (1979)(litigating federal constitutionality of state tax in state proceedings collaterally estopped re-litigation of issue in federal court, even though United States was not a party to state action but "had a sufficient 'laboring oar' in the conduct of the state court litigation"); Allen *v. McCurry,* 449 U.S. 90 (1980).

Collateral estoppel frequently is used to prevent parties in civil cases—including federal civil forfeiture cases—from re-litigating state court rulings on motions to suppress. Most of those cases involve use of collateral estoppel to preclude re-litigation by the claimant who was unsuccessful in the state court suppression hearing. For example, in *United States v. $174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003), the court affirmed the district court's denial of the claimants' motion to suppress, holding as follows:

> First, the district court correctly ruled that the Claimants' motion to suppress was barred by collateral estoppel. The Claimants had made an identical motion in state court, in which they similarly argued that the search warrant supporting the search of their home was based on false statements. The issues were identical, the issue was actually litigated in the first proceeding, and the issue was "necessary and essential to the judgment on the merits."

Id. at 663 (quoting from *United States v. Three Tracts of Property*, 994 F.2d 287, 290 (6th Cir. 1993). *See also, e.g., Anderson v. United States*, 62 Fed. Appx. 883, 885-86 (10th Cir. 2003)).

Although less numerous, some cases have held that collateral estoppel principles can bar further litigation of an issue decided in a criminal defendant's favor. *See Ashe v. Swenson*, 397 U.S. 436 (1970). The collateral estoppel doctrine may be used by the successful state court defendant against the federal government in a later civil or criminal case arising out of the same factual context as the state prosecution. Thus, in those situations involving participation by state and federal law enforcement officers in an illegal search and seizure, collaboration between the State and federal government in connection with the first suppression proceedings in state court, or other circumstances which establish privity between the two governmental entities, the absence of the federal government as a named party to the prior state court proceedings will not preclude use of the collateral estoppel doctrine to conclusively establish illegality of a search, seizure, or interrogation in the later federal action.

Florida follows the principle that "collateral estoppel, or issue preclusion, applies when 'the identical issue has been litigated between the same parties ***or their privies***.'" *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)(emphasis added). "Under Florida law, collateral estoppel applies if (1) an identical issue, (2) has been fully litigated, (3) by the same parties or their privies, and (4) a final decision has been rendered by a court of competent jurisdiction." *Quinn v. Monroe County*, 330 F.3d 1320, 1329 (11th Cir. 2003). The standard to be applied in determining the collateral estoppel effect of a prior Florida state court ruling on an issue is whether the party against whom collateral estoppel is asserted was "in privity with an actual party." *Balbirer v. Austin*, 790 F.2d 1524, 1527 n.1 (11th Cir. 1986).

A party will be in privity with a litigant from another case when the interests of those two parties were closely

aligned. "Identity of parties is not a mere matter of form, but of substance . . . parties nominally different may be *in legal effect*, the same." *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611, 620 (1926). In this case, the Government's interest was exactly the same as that of the State of Florida, so collateral estoppel should apply. *See generally, e.g., Sentry Insurance v. FCCI Mutual Life Ins. Co.*, 745 So. 2d 349 (Fla. 4th DCA 1999)(holding that party's insurance company was collaterally estopped by prior judgment in case involving insured because insurer's interests were aligned with those of the insured).

This Court has the power to re-examine the question of the Eleventh Circuit's refusal to grant full faith and credit to the Florida suppression ruling in *Haban I*, notwithstanding the fact that certiorari was not sought within ninety days of that decision. *See Reece v. Georgia*, 350 U.S. 85, 87 (1955)(Supreme Court's "right to re-examine such questions is not affected by a ruling that the first decision . . . became the law of the case"). Similarly, the constitutional infirmity of the *Haban I* footnote rejecting full faith and credit was properly reviewable by the *Haban II* court.

Haban submits that he was denied due process of law by the Eleventh Circuit's holding in *Haban I* that he had to litigate the suppression issue a second time, after having prevailed on that issue in a court of competent jurisdiction against a prosecutor in privity with the United States. The Government should not be given multiple bites at the apple. Therefore, this Court should accept certiorari review and consider the merits of the issue.

III.
THIS COURT SHOULD LIMIT ITS HOLDING IN *UNITED STATES v. RADDATZ* AND REQUIRE DISTRICT JUDGES TO CONDUCT EVIDENTIARY HEARINGS DE NOVO WHERE THE MAGISTRATE JUDGE RECOMMENDS DENIAL OF A MOTION TO SUPPRESS PHYSICAL EVIDENCE BASED ON CONTESTED CREDIBILITY DETERMINATIONS

This Court should grant certiorari to consider whether the district court properly overruled Haban's objections to the magistrate's report without a *de novo* evidentiary hearing. The ultimate determination of whether a search and seizure were reasonable under the Fourth Amendment is subject to *de novo* review. *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996).

This case is distinguishable from *United States v. Raddatz*, 447 U.S. 667 (1980). In *Raddatz*, the Court held that a district court judge was not required to conduct a *de novo* evidentiary hearing of the magistrate's recommendation on a motion to suppress. Part of the basis for this Court's decision in *Raddatz* is that the ruling on the suppression motion is not necessarily dispositive of the outcome of the case because: "[a] defendant who has not prevailed at the suppression hearing remains free to present evidence and argument to—and maybe to persuade—the jury that the confession was not reliable and therefore should be disregarded." *Id.* at 678.

Unlike the *Raddatz* situation in which the evidence sought to be suppressed is only a confession, in a case involving suppression of physical evidence seized as a result of an unlawful search, there was no possibility of persuading the trier-of-fact that the evidence is "not reliable and therefore should be disregarded." Thus, the character of the evidence

sought to be suppressed renders the reasoning of the Court in *Raddatz* inapplicable here.

Even if the character of the evidence sought to be suppressed in this case do not distinguish it from *Raddatz,* the sharp conflicts in the testimony and importance of weighing the credibility of the witnesses render this a case in which the district court should be required to recall the witnesses, rather than simply reviewing the transcript. *See Raddatz,* 447 U.S. at 694 (Marshall and Brennan, J.J., dissenting)("statutory provision for 'a *de novo* determination of . . . specified proposed findings . . . to which objection is made' . . . should be construed to require the district court to conduct an evidentiary hearing when there are case-dispositive issues of ***credibility*** that cannot be resolved on the basis of the record compiled before the magistrate")(emphasis added).

Here all the objective evidence (including Haban's initials on the "no" blank on the *Miranda* form and the drug-sniffing dog's refutation of the agents' testimony about smelling marijuana) supported Haban's position, not the Government's. In order for the Government's position to be accepted, credibility determinations were of paramount importance. Unless the district court judge can size up the witnesses and adjudge their credibility in person, review of the transcripts alone would not sufficiently protect the Claimant's rights. Principles of due process of law require that a *de novo* evidentiary hearing be afforded to Haban by an Article III judge.

There is no rational basis to require an evidentiary hearing where a district judge disagrees with the magistrate's credibility determination, but not where the district judge agrees with that determination. In each case, the district judge must pass on the credibility issue. That decision cannot be well

accomplished when the court has only the cold record to review instead of the live witnesses. This Court should grant certiorari and limit *Raddatz* to situations in which credibility is not fundamental.

CONCLUSION

WHEREFORE, there being likely violations of the Fourth Amendment, Fifth Amendment, and the Full Faith and Credit Statute, this Court should grant the writ and consider the issues on the merits.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12250
Non-Argument Calendar

D.C. Docket No. 02-21079-CV-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE PIECE OF REALTY LOCATED AT
5800 S.W. 74TH AVENUE, MIAMI,
FLORIDA, more particularly described as
Lot3, Block 3,of Camner Estates
according to the Plat Book 58 at Page
21 of the public records of Dade
County, Florida together with all
appurtences thereto and all
Improvements thereon,

Defendant,

STEVEN HABAN,

Claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 25, 2005)

Before BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Steven Haban, the owner of the property in question, appeals the district court's grant of summary judgment in favor of the government in an in rem civil forfeiture action, 21 U.S.C. § 881 (a)(7). The Government alleged in its complaint that the property had been used to commit or facilitate the commission fo a violation of the Controlled Substances Act. Police officers investigating a marijuan[a]-growing operation conducted a warrantless search of Haban's residence and located 84 marijuana plants, 767 grams of marijuana, and $45,000 in cash.

On appeal, Haban first argues that the district court clearly erred in finding that he voluntarily consented to the search of his house and seeks suppression of the marijuana evidence found therein. "A district court's ruling on a motion to suppress presents a mixed question of law and fact." United States v. Zapata, 180 F.3d 1237, 11240 (11th Cir. 1999). We accept the district court's factual findings as true unless the findings are shown to be clearly erroneous. Id. "[A]ll facts are construed in the light most favorable to the prevailing party below." United States v. Bervaldi, 226 F.3d 1256, 1262 (11th Cir. 2000). The district court's application of the law to the is reviewed de novo. Id.

"Credibility determinations are typically the province of the fact finder because the fact finder personally observes the testimony an dis thus in a better position than a reviewing court to assess the credibility of witnesses." United States v. Ramirez-Chilel, 289 F.3d 744, 749 (11th Cir. 2002). We have held that a "trial judge's choice of whom to believe is conclusive on the appellate court unless the judge credits

exceedingly improbable testimony." Id. (internal citations and punctuation omitted)(emphasis in original).

In this case, the magistrate found that the testimony of Haban and his girlfriend was not credible, in light of their denials and minimizations of their participation in any illegal activity. Specifically, among other things, the court noted that they claimed that much of the marijuana was for personal use and denied any prior knowledge about the marijuana, but that (1) Haban had admitted to growing 36 pounds of marijuana over 9 months, worth $216,000, and it would have been "virtually impossible" for him to consume that amount of marijuana, (2) the residence smelled of marijuana, and (3) there were marijuana growing apparatuses throughout the house. Conversely, the magistrate judge credited the testimony of the police officers and, based on the totality of the circumstances, ultimately found that Haban had given voluntarily consented to the search and voluntarily waived his Miranda rights. Because the police officer's testimony was not exceedingly improbable, the district court did not err in finding her credible, and, thus, did not err by finding that Haban voluntarily consented to the search of his home.

Haban next argues that the district court erred in denying him a de novo evidentiary hearing on his motions to suppress the physical evidence and his confession. He concedes that the Supreme Court has held that a district court is not required to conduct a de novo evidentiary hearing on a motion to suppress when a magistrate judge has conducted an evidentiary hearing, but he asserts that the instant case is distinguishable. He asserts that the Supreme Court only has considered this question in relation to a confession, whereas, here he seeks to suppress physical evidence. Alternatively, he argues that the Supreme Court should overrule the existing precedent. Finally, Haban contends that the district court

abused its discretion in denying his motions without a hearing because the police officers' testimony was contradictory.

A district court judge may designate a magistrate to conduct suppression hearings, but must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(B). The Supreme Court has held that "the statute calls for a de novo determination, not a de novo hearing." United States v. Raddatz, 447 U.S. 667, 674 100 S.Cr. 2406, 2411, 65 L.Ed.2d 424 (1980). The Court noted that the district court may, in its discretion, opt to conduct a de novo evidentiary hearing. Id. at 676, 100 S.Ct. At 2413. We have recognized that holding, noting that the district court's statutory obligation is satisfied "as long as the judge, rather than the magistrate, exercised 'ultimate adjudicatory power.'" Profitt v. Wainwright, 685 F.2d 1227, 1237 (11th Cir. 1982). Because the Supreme Court has held that a district court is not required to conduct a de novo evidentiary hearing when a party objects to a magistrate's recommendations, the district court did not abuse its discretion by denying Haban a de novo evidentiary hearing.

Finally, Haban filed a motion in the district court for leave to file a supplemental answer to the complaint, asserting that collateral estoppel was an affirmative defense that had not been available at the time when he filed his initial answer. Specifically, he argued that, since the time when he filed his initial answer, the Florida state court had granted his motions to suppress the same evidence in a criminal proceeding stemming from the same activity. Consequently, Haban sought, essentially, to enforce the state court ruling in the federal proceedings. The district court denied the motion, and, on appeal, Haban argues that we have accepted a policy of liberal amendments in regard to supplemental pleading, and thus,

because there was no good reason for denying leave to supplement a pleading, the district court abused its discretion in denying the motion. He asserts that there would have been no prejudice to the government due to the amended pleading, and a supplemental pleading was the appropriate vehicle for asserting the defense of collateral estoppel. Next, he argues that he only needed to show that the claim was potentially meritorious, or not futile, and that a claim that may survive a motion to dismiss is not futile. He states that the district court appeared to find that his claim was futile, but the case to which it cited did not stand for the proposition for which it was offered. Finally, he argues, applying Florida law, all the elements of collateral estoppel are present in the instant case.

> Federal Rules of Civil Procedure
>
> Upon a motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Fed. R. Civ. P. 15(d). The district court's application of Rule 15 is reviewed for an abuse of discretion. Davenport v. United States, 217 F.3d 1341, 1343 n.4 (11th Cir. 2000). We have accepted a policy of liberal amendments and supplements to the pleadings under Rule 15. See Harris v. Garner, 216 F.3d 970, 984 (11th Cir. 2000).

However, there is no error here. Because this Court held, in an earlier appeal in this case, that a state court's ruling on a motion to suppress was not binding on the federal court, the law-of-the-case doctrine barred the district court from reconsidering the issue. Upon careful review of the record on appeal and consolidation of the parties' briefs, we discern no reversible error in any of the claims asserted.

AFFIRMED.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

-vs.-

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 SW 74TH AVENUE, MIAMI, FLORIDA, more particularly described as Lot 3, Block 3 of camner estates according to the Plat Book 58, at page 21 of the public records of Dade County, Florida together with all appurtenances thereto and all improvements thereon, Defendant,

STEPHEN HABAN, Defendant-Appellant

No. 03-11736

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

363 F.3d 1099

March 24, 2004, Filed

WILSON and KRAVITCH, Circuit Judges, and Goldberg*, Judge.

* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

OPINION BY: KRAVITCH

I. BACKGROUND

In June 2001, the Drug Enforcement Agency and Miami-Dade police officers initiated an investigation into possible marijuana cultivation and distribution activities at the house of Stephen Haban, the defendant. Exactly what

happened that day is not clear. According to the government, several officers knocked on Haban's front door. Haban's girlfriend responded and then went to find Haban. A few minutes later, Haban, who had been in the shower,, stepped outside wrapped in only a towel. The lead officer informed Haban that they were investigating a marijuana tip and presented Haben with a "consent-to-search" form and a "Miranda rights" form. Haban initially had reservations about waiving his Miranda rights and began to check the "no" box on the form. When the police explained the rights more thoroughly, Haban indicated his understanding. The officer checked the box indicating a waiver and Haban initialed above each checkmark. Haban also initialed a box stating that he was "willing to answer [any] questions without having a lawyer present," and signed the Miranda form and the consent-to-search form. The police commenced the search of Haban's house, finding eighty-four live marijuana plants, growing equipment, 767 grams of processed marijuana, and $45,000 in cash. During this time, Haban made several incriminating remarks.

According to Haban, he did not voluntarily consent to the search of his residence. Rather, he claims that he only signed the consent-to-search form because th police refused to allow him to speak to a lawyer, although he asked several times. In addition, he claims that the police told him that he would be forced to wait outside until the police obtained a warrant, and once they obtained that warrant they would tear his house apart and arrest his girlfriend.[7]

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[7] Based on the evidence seized during the search, Haban faced criminal charges in a Florida state court. Haban filed a motion to suppress the evidence obtained from the search. The Florida state court apparently believed Haban's account of the events and granted that motion. Federal courts, however, are not bound by the state court's decision. *See Elkins v.*

The United States brought a forfeiture action, claiming that Haban's residence was used to commit, or facilitate the commission of, a drug crime, in violation of *21 U.S.C. § 881 (a)(7)*. On November 1, 2002, Haban filed a motion to suppress the evidence seized during the search, and to suppress the statements he made during the interview with law enforcement agents. The magistrate judge held an evidentiary hearing on January 14 and 16, 2003, and, on November 27, 2002, while the suppression motion was pending but prior to the suppression hearing, the United States filed a motion for summary judgment. Haban never responded to this motion and, on January 31, 2003, the district court granted summary judgment for the United States. At the same time, the district court denied all pending motions, including Haban's suppression motion, as moot.

II. STANDARD OF REVIEW AND RULES OF LAW

We review a district court's grant of summary judgment de novo. *Pennington v. City of Huntsville, 261 F.3d 1262, 1265 (11th Cir. 2001)*. We view the facts and inferences in the light most favorable to the non-moving party. *Id.* Where "th adverse party does not respond, summary judgment, *if appropriate*, shall be entered against the adverse party." *Fed. R. Civ. P. 56(e)* (emphasis added). Thus, summary judgment, even when unopposed, can only be entered when "appropriate."

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P.*

United States, 364 U.S. 206, 2323-24, 4 L 4. Ed. 23 1669, 80 S. Ct. 1437 (1960); United States v. Perchitti, 955 F. 2d 674, 675 (11th Cir. 1992).

56(c) (emphasis added). Thus, the district court cannot base the entry of summary judgment on the mere act that the motion wsa unopposed, but, rather, must consider the merits of the motion. *See Dunlap v. Transamerica Occidental Live Ins. Co., 858 F.2d 629, 632 (11th Cir. 1988)* (per curiam). The district court need not sua sponte review all of the evidentiary materials on file at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary materials. *See id.* At the least, the district court must review all of the evidentiary materials submitted in support of the motion for summary judgment. *Jaroma v. Massey, 873 F.2d 17, 20 (1st Cir. 1989)* (per curiam) ("The district court cannot grant a motion for summary judgment merely for lack of any response by the opposing party, since the district court must review the motion and the supporting papers to determine whether they establish the absence of a genuine issue of material fact."). In addition, so that there can be an effective review of the case on appeal, the district court's order granting summary judgment must "indicate that the merits of the motion were addressed."[8] *Dunlap, 858 F.2d at 632.*

Finally, local rules cannot provide that summary

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[8] The district court's order granting summary judgment, in relevant portion, stated only that: "THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised of the premises. It appearing that the Defendant has not responded to the motion for Summary Judgment, it is ADJUDGED that the motion is, GRANTED by default." Although the order states that the district court considered the "pertinent portions of the record," from this language, we cannot determine specifically which portions of the record the district court actually considered. Moreover, the fact that the court granted summary judgment "by default" suggests that the district court may not have reviewed all the required portions of the record. We need not decide the case on this basis, however, because our review of the records convinces us that there is a genuine issue of material fact that made summary judgment inappropriate.

judgment by default is appropriate. *Rule 83 of the Federal Rules of Civil Procedure* requires that local rules be consistent with the Federal Rules. If a local rule purports to allow summary judgment to be granted by default, the rule is impermissible.

III. ANALYSIS

A review of the record indicates that there was a was a genuine issue of material fact as to whether the search of Haban's house was legal, which made summary judgment inappropriate. The government represents that the search of Haban's house was a valid consent search, but the deposition of Haban's girlfriend contradicts this proposition, indicating that there is a genuine issue ofmaterial fact as to whether Haban voluntarily consented to the search of his house, and therefore, whether the search was legal.[9] The government's summary judgment motion states: "On June 15, 2001, a consent search was executed at the defendant property . . ." Similarly, the government's "Statement of Undisputed Facts in Support of its Motion for Summary Judgment" reads: "Steven J. Haban answered the door and provided oral and written consent to search the defendant property." The deposition of Beth Yannuci Fhmie, Haban's girlfriend, however, suggests that Haban's consent was involuntary. Her deposition was attached to the government's motion for summary judgment.[10]

Fahmie's deposition statements suggest that the

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[9] The *Fourth Amendment* exclusionary rule applies in civil forfeiture actions. *One 1958 Plymouth Sedon v. Pennsylvania, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965).* Without the evidence from the search, there is no evidence to support the government's position.

[10] We confine our review of the record in this case to the materials submitted by the United States in support of its summary judgment motion.

circumstances under which Haban consented to the search may have been coercive. Fahmie was present during the events leading up to the search. She stated that, a short while after summoning Haban, someone called her to the front door. As she was walking to the front door, an officer with a gun greeted her and escorted her outside. Once outside, Fahmie heard Haban ask to speak with an attorney several times, but, each time, the officers refused to allow him to do so. According to Fhmie, the police also refused Haban's request to make a telephone call and his request to obtain more clothing.[11] In addition, she alleged that the police told Haban he had to sign the consent-to-search form, and, if he did not do so, he would be forced to wait until they got a warrant, at which time they would "tear his house apart and arrest his girlfriend." Finally, she claimed that when Haban "went to sign the [form]", the police said "no, no, no, not there," and had him resign it. Apparently, Haban began to sign the blank that indicated a refusal to waive his rights and consent to the search. The police, however, allegedly stopped him, and only then did he sign the blank indicating that the was aware of, and waived, his rights. These facts, if true, indicate that the search was not consensual and that its eventual occurrence was, therefore, illegal. Thus, Sahmie's deposition creates a genuine issue of material fact as to what happened on the day of the search, and as to whether the search was legal.[12] Summary judgment

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[11] Haban was still dressed in only a towel.

[12] The government contends that, under the local rules, its Statement of Undisputed Facts was "deemed admitted" by Haban because it was not "controverted by the opposing party's statement." *S.D. Fla. L.R. 7.5(D)*. Such facts are only "deemed admitted . . . to the extent [that they are] supported by specific references to the [record]." Id. The government supports its statements with citations to the record, and, thus, under the local rule, they would appear to be admitted. The district court must, howevere review the record and determine if there is, indeed, no genuine issue of

should not have been granted on such a record.[13]

For the foregoing reasons, we reverse the decision of the district court granting the government's motion for summary judgment. We remand the case for proceedings consistent with this opinion.

REVERSED and REMANDED

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material fact. Because a review of the record indicates a disputed issue of material fact, summary judgment could not be granted. To the extent that Local *Rule 7.5(D)* permits the district court to grant summary judgment without a review of hte record, that rule is inconsistent with *Federal Rule of Civil Procedure 56*, and therefore, void.

We also note that the government's summary judgment motion acknowledged that summary judgment would not be appropriate if the evidence obtained from the search was suppressed. The motion stated: "Should the court *deny* claimant's [suppression] motion, then this Motion for Summary Judgment is ripe of consideration and ruling." (Emphasis add.)

In addition, we recognize that Haban filed objections to the magistrate's recommendation on the suppression issue. Although required to do so, the district court did not make a de novo review of these objections. *28 U.S.C. § 636(b)(1)*

[13] As stated above, supra n.3 , the evidence from the search is necessary to support the government's position. The district court should have ruled on the suppression motion prior to considering the government's summary judgment motion in order to determine what evidence it could consider on summary judgment.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY

CRIMINAL DIVISION

CASE NO: F01-18879

THE STATE OF FLORIDA

Plaintiff,

vs.

STEPHEN HABAN,

Defendant.
_____/

Order Granting Defendant's Motion to Suppress Physical Evidence and Motion to Suppress Defendant's Statements

THIS CAUSE came before this Court on December 20, 2002, for an evidentiary hearing on Defendant's Motion to Suppress Physical Evidence and Motion to Suppress Defendant's Statements.

For the purposes of the hearing, the parties stipulated that the house[1] which was searched, was owned and

[1] A single family dwelling located at 5800 S.W. 74th Avenue, Miami-Dade County, Florida.

occupied by the Defendant, Stephen Haban[2] and that the search was conducted without a warrant.

Having considered the testimony of all witnesses, photographs, the *Miranda* rights waiver form, the consent to search form, the argument of counsel and the applicable authority, the court makes the following findings of fact[3]:

FINDINGS OF FACT

1. As a result of a mere tip[4], at approximately 11:50 am, several police officers[5] approached the front door of the Defendant's home.

2. In order to reach the front door, the officers had to enter through a closed wooden gate, which blocks the walkway between the door and the sidewalk.

3. The officers knocked on the front door and the Defendant's friend, Beth Fahmie, who was inside, went to summon the Defendant who was taking a shower.

4. The Defendant, wet and clothed only in a towel around his waist, went to the door and observed the officers on his front porch.

5. The Defendant looked through a small

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[2] Accordingly, the Defendant has standing to contest the legality of the search.

[3] The court specifically finds all testimony which is inconsistent with these findings to not be credible or worth of belief.

[4] There was no testimony suggesting the tip was from a reliable source or that it was corroborated in any way.

[5] There were between six and seven armed officers.

window in the front door and could see Detective Donnelly holding papers in her hand.

6. One of the officers told the Defendant to open the door because they wanted to speak with him.

7. The Defendant complied with the instruction to open the door by unlocking it and opening the door approximately eight inches.

8. The police claim that when the Defendant opened the door they could smell the odor of marijuana. As will be explained later, this testimony is not credible and is rejected.

9. The officers then told the Defendant that they had information that marijuana was being grown in the home and that they wanted him to come outside, onto the front porch (dripping wet and virtually naked - dressed only in a towel) so they could talk to him.

10. The Defendant again complied with the instruction and exited his home and was directed to a table to be interviewed by the only female police officer present, where he was essentially surrounded by the other officers.

11. This court specifically finds the Defendant to be educated, intelligent and eloquent.

12. The Defendant was then presented with both the *Miranda* rights waiver form and the consent to search form. His attention was directed first to the *Miranda* form.

13. The *Miranda* form presented to the Defendant contains each right separately set forth. After each, there si a "yes" with a blank space to indicate a lack of understanding of that right. The Defendant was supposed to place his initials on either the yes or no blank space according to whether he understood that right or not.

14. With respect to the first right on that form

(*i.e.* the right to remain silent) the Defendant tried to place his initials in the "no" space but was interrupted and prevented by the police from doing so. The form contains the Defendant's partial initials in the "no" space.

15. The Defendant's claim that he tried to initial the "no" with a blank space because he did not wish to waive his rights, is credible and is believed.

16. Thereafter, Detective Donnelly placed a check mark next to each "yes" blank and instructed the Defendant to place his initials next to each mark. The Defendant complied with this instruction.

17. Prior to the Defendant's execution of the consent to search form, the police informed him that they would obtain a warrant if he refused.

18. After the Defendant signed both the *Miranda* form and the consent to search form he "confessed" and told the police where the marijuana plants and other contraband were located.

19. Detective Robbins and a drug sniffing dog then approached and entered the residence. Apparently, the drug sniffing dog has a very limited abilities since it did not "alert" upon approaching the door and thus the dog could not smell the marijuana all the officers claimed they could smell. For this reason the claim by the officers that they could smell the marijuana when the Defendant opened the door is rejected and is not believed.

20. Det. Robbins exited the house and informed the other officers that the dog had alerted at several locations within the home.

21. The police then searched the home and seized growing marijuana plants, money, and other contraband.

CONCLUSION

Assessing the objective circumstances of the situation from the perspective of a reasonable person in the Defendant's position, this court finds that the Defendant's freedom of action was deprived in a significant way and that he was thus in custody at the time of his interrogation. In *Miranda v. Arizona*[6], the Supreme Court held that a Defendant's statement may not be introduced in evidence unless the prosecution shows that the accused voluntarily, knowingly and intelligently waived his right to remain silent as guaranteed under the Fifth Amendment to the Constitution. The State has failed in this showing and this court finds that Defendant actually tried to exercise his right to remain silent, but was prevented from doing so. The court finds that the *Miranda* rights wavier form was not executed voluntarily and that the Defendant's statements were not voluntarily made.

Because a warrantless search is *per se* unreasonable under the Fourth Amendment to the Constitution[7], the State has attempted to show that the search was *sub judice* was conducted pursuant to the Defendant's voluntary consent. It is well-settled that consent is not voluntary if given only in acquiescence to a claim of lawful authority[8]. Therefore, a warrantless search may not be justified on the basis of consent that is given only after the police claim that they have possession of a warrant or that one can be

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[6] 384 U.S. 436 (1984).

[7] *Jorgenson v. State*, 714 So. 2d 423 (Fla. 1998).

[8] *Bumper v. North Carolina*, 391 U.S. 543 (1968).

obtained if necessary[9]. Here, once again, the totality of the circumstances show that the consent to search was not freely and voluntarily given and that it was given, at best, because the Defendant acquiesced to the show of authority after he was escorted out of his house, in daylight, in view of his neighbors while virtually naked and surrounded and questioned by both male and female officers.

It is therefore, ORDERED and ADJUDGED that Defendant's Motion to Suppress Physical Evidence and Motion to Suppress Defendant's statements is hereby GRANTED.

DONE and ORDERED in Miami-Dade County, Florida this 7th day of January, 2003.

Pedro P. Echarte, Jr.
Circuit Court Judge

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[9] See e.g. *U.S. v. Tovar-Rico*, 61 F3d 1529 (11th Cir. 1995).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12250

D.C. Docket No. 02-21079-CV-KMM
Filed November 16, 2006
Thomas K. Kahn, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE PIECE OF REALTY LOCATED AT
5800 S.W. 74TH AVENUE, MIAMI,
FLORIDA, more particularly described as
Lot3, Block 3,of Camner Estates
according to the Plat Book 58 at Page
21 of the public records of Dade
County, Florida together with all
appurtences thereto and all
Improvements thereon,

Defendant,

STEVEN HABAN,

Claimant-Appellant.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

FILED
061178 FEB 14 2007
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN HABAN and ONE PIECE OF REALTY LOCATED AT 5800 S.W. 74TH AVENUE, MIAMI, FLORIDA, More Particularly Described as Lot 3, Block 3,of Camner Estates According To the Plat Book 58 at Page 21 of the Public Records of Dade County, Florida Together with All Appurtences Thereto and All Improvements Thereon,

Petitioners,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI

ROY D. WASSON
Counsel of Record for Petitioners
WASSON & ASSOCIATES, CHARTERED
1320 S. Dixie Highway, Suite 450
Miami, Florida 33146
(305) 666-5053

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-21079-CIV-MOORE/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE SINGLE FAMILY RESIDENCE,
LOCATED AT 5800 S.W. 74th AVENUE,
MIAMI, DADE COUNTY, FLORIDA
INCLUDING ALL IMPROVEMENTS,
FIXTURES AND APPURTENCES
THERETO AND THEREON,

Claimant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Claimant Haban's Motion to Suppress Physical Evidence Obtained Through an Unlawful Search and Seizure (DE#34, 11/1/02) and Claimant/Respondent Haban's Motion to Suppress Haban's Confessions, Admissions and Statements (DE #35, 11/1/02). This case was referred to United States Magistrate Judge John J. O'Sullivan by the Honorable K. Michael Moore, United States District Court Judge for the Souther District of Florida. Having heard testimony and oral argument and carefully considered the Claimant's motion, the court file and applicable law, the undersigned respectfully recommends that Claimant Haban's Motion to Suppress Physical Evidence Obtained

Through an Unlawful Search and Seizure (DE #34, 11/1/02) and Claimant/Respondent Haban's Motion to Suppress Haban's Confessions, Admissions and Statements (DE #35, 11/1/02) be **DENIED.**

BACKGROUND

On April 9, 2002 the government filed a civil forfeiture action against a residence located at 5800 SW 74th Avenue, Miami, Florida. The residence is owned by the Claimant Stephen Haban. The forfeiture action arises out of an alleged consent search of the Claimant's home on June 15, 2001. The search resulted in the seizure of approximately 84 live marijuana plants and hydroponic equipment used to grow marijuana.

FINDINGS OF FACT

On June 15, 2001, Miami Dade Police Department detectives went to eh claimant's residence located at 5800 S.W. 74th Avenue, Miami, Florida. The police had received information from a reliable confidential informant that the residence was being used to grow marijuana. Police officers entered the claimant's property through a front gate and through an ungated portion of the front yard that was adjacent to a driveway. The lead detective on the case approached the front door with her sergeant and lieutenant. There were four additional detectives in the front yard area of the residence. None of the detectives had their weapons drawn. The police knocked on the front door of the home. A female voice, later identified as the claimant's girlfriend, asked who it was and the police responded that ti was the police and that they wanted to talk with someone inside. The claimant's girlfriend went to the bathroom and told the claimant that the police were at the door. The claimant got out of the shower, wrapped a towel around

himself, retrieved the key to the inside lock of the front door and proceeded to the front door of his residence. The claimant looked out of a covered window in the front door and observed police officers. The police requested the claimant to open the front door. The claimant complied and opened the door several inches. The police identified themselves to the claimant and asked him to come outside. The claimant stepped outside onto his front porch. The claimant sat down at a table located on his front porch. The lead detective told the claimant that they were investigating allegations that marijuana was being grown in the claimant's house and that she had smelled marijuana when the door to the house was opened. The lead detective presented the claimant with a "consent to search" form and a "*Miranda* rights" form. The claimant appeared to be nervous. The claimant's girlfriend came out of the house and was seated at the table with the claimant. The claimant was told that is he did not sign the consent to search form that the police would attempt to get a search warrant.

The claimant signed the consent to search form at approximately 11:55 a.m. A police detective and his drug sniffing dog entered the residence. The dog handler reported to the lead detective that the dog had alerted to drugs in the residence. The claimant was read his *Miranda* rights and signed a form waiving those rights. The form divides the *Miranda* rights into four separate rights and asks whether the claimant understands each right. There is a " Yes" and a "No" spot for a person to initial and respond to the question "Do you understand that right?".[1] At the end of the explanation of each of the rights, there is a question that reads: "Knowing these rights, are you now willing to answer my questions without a

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[1] The claimant first began to place his initials in the "No' box which indicated that he did not understand his right to remain silent. The lead detective explained that if he understood the right, he should initial the "Yes" box which the claimant then initialed. The lead detective placed a check mark next to each of the "Yes" boxes.

lawyer present?" The claimant indicated on the form, by his initials, that he understood each right and that he agreed to answer questions without a lawyer. In addition, the claimant signed the form after the statement: "This statement is signed of my own free will without any threats or promises having been made to me."

A search of the claimant's residence revealed marijuana plants and growing equipment throughout the claimant's house including the claimant's kitchen, den, master bedroom, and master bedroom closet. The master bedroom closet contained men's and women's clothing and small cloned marijuana plants. The smell of marijuana in the house was strong and distinct. The claimant admitted that he was preparing for his third harvest and that he harvested his plants every ninety days. He told detectives that he sold his marijuana to friends for $375.00 per ounce.

The claimant and his girlfriend testified that the claimant repeatedly asked for counsel prior to signing the "Consent search" and "Miranda" forms. The claimant's girlfriend denied knowledge of the growth of any marijuana in the house and admitted that although she observed plants in the home, she did not know they were marijuana plants. The girlfriend testified that there was no unusual odor in the home except for when the claimant burned incense.

The claimant testified that he only signed the waiver forms because he was continuously denied his request for counsel and he believed that the police officers might be preparing to conduct a home invasion robbery of the claimant's residence. The claimant also testified that the harvest of the marijuana present in the home on the day of the search would produce twelve to fourteen pounds of marijuana. The claimant stated that most of the marijuana he produced was for personal

use.[2]

ANALYSIS

The Claimant asserts that he did not voluntarily consent to a search of his residence. The question of whether a claimant's consent was in fact voluntary or a product of duress or coercion, express or implied, is to be determined by the totality of the circumstances and is a matter for which the Government has the burden of proof. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2.d 497 (1980); Schenckloth v. Bustamante, 412 U.S. 218 93 S.CT. 2041 36 L.Ec.2d 854 (1972). While a warrantless search is generally lawful when conducted pursuant to a subject's voluntary consent, the government must prove that consent was given voluntarily, as an independent act of free will and not mere acquiescence to police authority. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). See also Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). To be considered voluntary, a consent to search must be the product of an essentially free and unconstrained choice. United States v. Garcia, 890 F.2d 355, 360 (11th Cir.

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[2] The undersigned finds that the testimony of the claimant and his girlfriend that his requests for counsel were denied is not credible. The undersigned notes that both of these witnesses either denied or minimized their participation in illegal conduct almost to the point of absurdity. The girlfriend denies any knowledge of the growing of marijuana in the residence even though the residence smelled of marijuana and there was marijuana growing apparatus throughout the residence. The claimant insists that most of the marijuana that was produced was for his own consumption. The court notes that the claimant's consumption of most of the thrity-six pounds of marijuana that the claimant admitted to producing in the nine months prior to his arrest would be virtually impossible. Not to mention that the thirty-six pounds of marijuana was valued at $216,000 (36 lbs. x 16 oz./lb x $375 oz). Based on the claimant's and claimant's girlfriend's testimony, when in conflict with the testimony of police detectives, is not credible.

1989).

In the case at hand, the totality of the circumstances demonstrates that the claimant's consent to search was voluntary. The claimant is an intelligent articulate person. The claimant signed the "Consent to search form" and acknowledged that he was aware of his right to refuse consent and that no threats or promises were made to him. There were approximately seven police officers present in the claimant's front yard at the time of consent. The claimant was only being spoken to by the lead investigator, there were no threats made and no guns were drawn or pointed at the claimant. When the claimant inquired what would happen if he refused to consent to the search, the police told him that they would apply for a search warrant. The facts are less coercive that those in Garcia, 890 F.2d at 360, where the Eleventh Circuit, found a defendant's consent to be voluntary when the defendant was arrested in the front yard of his house by fourteen law enforcement agents, and then taken inside after the agents conducted a "protective sweep" of the house. Garcia's request to provide a partial consent was denied by the police and Garcia was told that they would attempt to get a search warrant. Garcia was handcuffed when he gave the agents consent to search the house. The Eleventh Circuit noted that it had approved consent given under "far more coercive conditions" and stated, "we cannot conclude that these factors caused Garcia's consent to become involuntary." Id. At 362. In this case, the defendant was not arrested until after the consent to search was obtained and was not handcuffed. The evidence found within the defendant's residence should be admissible at trial.

MIRANDA RIGHTS

The Claimant asserts that any statements made by him should be suppressed because the Claimant did not voluntarily

waive his Miranda rights. The government argues that the Claimant signed a Miranda rights form and voluntarily waived his Miranda rights.

In order to establish a valid waiver of Miranda rights, the government must show by a preponderance of the evidence, that the subject voluntarily, knowingly, freely and intelligently waived those rights, with knowledge of the consequences of the waiver. Colorado v. Connelly, 479 U.S. 157, 168 (1986); see Moran v. Burbine, 457 U.S. 412, 421 (1986); Schneckloth v. Bustamante, 412 U.S. 218 (1973). The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the subject. Edwards v. Arizona, 451 U.S. 477, 482 (1981); see Moran, 457 U.S. at 421. Factors that should be considered in making such a determination include: age of the accused, educational level, level of intelligence, whether there was advisement of constitutional rights, length of detention, and the nature of the questioning. See Townsend v. Sane, 372 U.S. 293, 307 (1962); see also, Moore v. Dugger, 856 F.2d 129, 134-135 (11th Cir. 1988); Coleman v. Singletary, 30 F. 3d 1420, 1426 (11th Cir. 1994).

The government has demonstrated by a preponderance of the evidence, that the claimant received notice of his Miranda rights and with such notice, the claimant knowingly, freely and voluntarily waived those rights. The claimant is an intelligent articulate person. The claimant signed the "Miranda" form and indicated that not threats or promises had been made to him. The claimant was not threatened. The claimant's assertion that he repeatedly requested an attorney is not believable and his assertion that he was in fear of a home invasion robbery is not reasonable or believable. It is incredible to believe that a rogue group on police officers intent on conducting a home invasion robbery would first insist upon the homeowner signing "consent to search" and "Miranda rights" forms.

The undersigned recommends that the claimant's statements to law enforcement be admissible against him at trial.

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that Claimant's Haban's Motion to Suppress Physical Evidence Obtained Through an Unlawful Search and Seizure (DE #34, 11/1/02) and Claimant/Respondent Haban's Motion to Suppress Haban's Confessions, Admissions and Statements (DE #35, 11/1/02) be **DENIED**. Pursuant to 28 U.S.C. §636(b)(1)(B) and (C), the parties may serve and file written objections to this Report and Recommendation with the Honorable K. Michael Moore, United States District Judge, within ten (1) of a receipt of a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d §404 (5th Cir. 1982).

DONE AND ORDERED, in Chambers, in Miami, Florida, this 22 day of January, 2003.

John J. O'Sullivan
UNITED STATES MAGISTRATE JUDGE

copies provided to:
U.S. District Judge Moore
All Counsel of Record

Entered on FLSD Docket 1/23/03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21079-CIV-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

ORDER GRANTING SUMMARY JUDGMENT

vs.

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MORE PARTICULARLY DESCRIBED AS LOT 3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

_____/

THIS CAUSE came before the Court upon Plaintiff's Motion for Summary Judgment (**DE #44**).

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises. It appearing that the Defendant has not responded to the motion for Summary Judgment, it is

ADJUDGED that the motion is, **GRANTED** by default. Fed. R. Civ. P. 56(e). Final Summary Judgment is hereby entered in favor of the Plaintiff and against the Defendant, together with costs to be taxed by the Clerk of this Court upon the filing of an appropriate bill of cost form. The

Clerk of Court is directed to mark this case as **CLOSED**. All pending motiosn not otherwise ruled upon are **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January, 2003.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21079-CIV-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

vs. **FINAL JUDGMENT OF FORFEITURE**

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MORE PARTICULARLY DESCRIBED AS LOT 3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

Defendant,

_____/

THIS CAUSE came before the Court for entry of judgment of forfeiture based on this Court's Granting of Summary Judgment, issued January 31, 2003. After a review of the record and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant, one piece of real property located at 5800 S.,W. 74th Avenue, Miami, Florida is hereby **FORFEITED** TO THE United States

of America. The United States Marshal shall dispose of the defendant property in accordance with the law.

DONE AND ORDERED IN Chambers, in Miami, Florida, this 4th day of March, 2003.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record
United States Magistrate Judge
John J. O'Sullivan

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21079-CV-MOORE

UNITED STATES OF AMERICA.

Plaintiff,

vs.

ONE PIECE OF REAL PROPERTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MOORE PARTICULARLY DESCRIBED AS LOT 3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL IMPROVEMENTS THEREON,

Defendant.

_____/

THIS CAUSE came before the Court upon Claimant's Motion for Reconsideration of Final Judgment (**Filed March 19, 2003**). A motion for reconsideration should only be granted to correct manifest errors of law or fact, or where newly discovered evidence is presented; reconsideration I snot an appropriate vehicle "to present authorities available at the time of the first decision or to reiterate arguments previously

made."[3]

Claimant has not raised any new arguments in his Motion, but rather revisits the arguments made before th Magistrate and in his motion for relief from judgment which this Court denied on February 24, 2003. Accordingly, it is **ORDERED AND ADJUDGED** that the Plaintiff's Motion for Reconsideration be, and the same is, hereby **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of March, 2003.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc:
All counsel of record

[3] *ABB Power T&D Co., v Gothaer Versicherungsbank VVAG,* 939 F. Supp. 1563, 1572 (S.D. Fla. 1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 02-21079- CIV-MOORE

Magistrate Judge O'Sullivan
UNITED STATES OF AMERICA

Plaitniff,

vs.

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 4800 S.W. 74th AVENUE
MIAMI, DADE COUNTY, FLORIDA
INCLUDING ALL IMPROVEMENTS
FIXTURES AND APPURTENANCES
THERTO AND THERON,

Claimant

_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Claimant's Motion to Suppress Physical Evidence Obtained Through an Unlawful Search and Seizure (DE #34) and Claimant's Motion to Suppress Omissions and/or Statements (DE #35).

THE MATTER was referred to the Honorable John J. O'Sullivan, United States Magistrate Judge. After hearing testimony and oral argument, Magistrate O'Sullivan issued a Report and Recommendation dated January 21, 2003 (DE #16), recommending that Claimant's Motion to Suppress Physical

Evidence Obtained Through and Unlawful Search and Seizure (DE #34) and Claimant's Motion to Suppress Omissions and/or Statements (DE #35) be denied. Claimant filed objections to the Report and Recommendation on February 4, 2003 (DE #59). Accordingly, after a de novo review of the record herein, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that United States Magistrate Judge O'Sullivan's Report and Recommendation of January 21, 2003 be, and the same is, hereby ADOPTED as the opinion of the Court.[4] Claimant's Motions to Suppress are therefore DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of January, 2005.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
U.S. Magistrate Judge White
All counsel of record

[4] Contrary to the assertions of Claimant, federal courts are not bound by a state court's determination of search and seizure suppression issues. See Elkins v. United States, 364 U.S. 206 (1960).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 02-21079-CIV-MOORE

UNITED STATES OF AMERICA,

Plaintiff,

vs. **ORDER**

ONE PIECE OF REALTY LOCATED AT 5800 S.W. 74th AVENUE, MIAMI, FLORIDA, MORE PARTICULARLY DESCRIBED AS LOT3, BLOCK 3, OF CAMNER ESTATES ACCORDING TO THE PLAT BOOK 58 AT PAGE 21 OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA TOGETHER WITH ALL APPURTENANCES THERETO AND ALL IMPROVEMENTS THERON,

Defendant,

_____/

THIS CAUSE came before the Court upon Plaintiff's Motion for Final Judgment of Forfeiture (DE #91) and Defendant's Motion to Reconsider (DE #95).

UPON CONSIDERATION of the Motion the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

On January 4, 2005, this Court adopted the Magistrate's Report and Recommendation (DE #84), denying Haban's Motion to Suppress. Based on the denial of Haban's Motion to Suppress, Plaintiff's Motion for Summary Judgment was

granted on March 3, 2005 (DE #88). Defendant now moves for reconsideration, arguing that the federal government was collaterally estopped from re-litigating the state court rulings on the motion to suppress.[5] As the Eleventh Circuit noted in remanding this case, "federal courts . . . are not bound by the state court's decision." U.S. v. One Piece of Real Property Located at 5800 S.W. 74th Avenue, Miami, Florida, 363 F. 3d 1099, 1101 (11th Cir. 2004). Therefore, the federal government was not collaterally estopped from litigating Defendant's motion to suppress.

Accordingly, it is ORDERED AND ADJUDGED that the Defendant's Motion for Reconsideration is DENIED. It is further

ORDERED AND ADJUDGED, and based thereon, that Plaintiff's Motion for Final Judgment of Forfeiture is GRANTED in favor of the United States of America against the piece of real property located at 580-0 S.W. 74th Avenue, Miami, Florida. All right, title and interest to the said property is hereby forfeited to the United States pursuant to the provisions of 21 U.S.C. § 881 (a)(7) and the procedures set forth in the Controlled Substances Act, 21 U.S.C. § 801 et seq. The United States Marshal Service or its duly authorized agent shall dispose of the defendant property in accordance with the law. It is further

ORDERED AND ADJUDGED that this case is CLOSED. All motions not otherwise ruled upon are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of March, 2005.

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[5] Defendant also argues that he is entitled to a de novo evidentiary hearing on this motion to suppress. However, because this Court adopted the Magistrate Judge's Report and Recommendation, Defendant is not entitled to a de novo hearing. *See LoConte v. Dugger*, 847 F. 2d 745 (11th Cir. 1988).

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record